Supreme Court, U.S.
FILED
NOV 1 1994
OFFICE OF THE CLERK

No. 94-161

In the Supreme Court of the United States

OCTOBER TERM, 1994

WERNER T. HEUER, PETITIONER

v.

UNITED STATES SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PHILEMINA MCNEILL JONES
DONALD E. KEENER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Department of State's issuance of a Certificate of Loss of Nationality to an individual who has formally renounced his United States citizenship constitutes a "final administrative denial" of a right or privilege as a national of the United States, thereby commencing the running of the five-year statute of limitations imposed by 8 U.S.C. 1503(a) for actions seeking a judicial declaration of United States nationality.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brady v. *United States*, 397 U.S. 742 (1970)	9
Ferretti v. *Dulles*, 246 F.2d 544 (2d Cir. 1957)	8
Garcia-Sarquiz v. *Saxbe*, 407 F. Supp. 789 (S.D. Fla. 1974), aff'd, 527 F.2d 1389 (5th Cir. 1976)	8
Kahane v. *Shultz*, 653 F. Supp. 1486 (E.D.N.Y. 1987)	8
Linzalone v. *Dulles*, 120 F. Supp. 107 (S.D.N.Y. 1954)	8
Maldonado-Sanchez v. *Shultz*, 706 F. Supp. 54 (D.D.C. 1989)	7, 8, 9
Richards v. *Secretary of State*, 752 F.2d 1413 (9th Cir. 1985)	8, 9
Ticor Title Ins. Co. v. *Brown*, 114 S. Ct. 1359 (1994)	9
Vance v. *Terrazas*, 444 U.S. 252 (1980)	5, 8
Whitehead v. *Haig*, 794 F.2d 115 (3d Cir. 1986)	4, 5, 6, 8

Statutes and regulations:

Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 106, 108 Stat. 4305	6, 8
8 U.S.C. 1481	3
8 U.S.C. 1481(a)	3
8 U.S.C. 1481(a)(5)	2, 3, 4, 5, 8, 9
8 U.S.C. 1481(b)	4-5
8 U.S.C. 1501 (§ 358)	2, 3, 4, 6, 9
8 U.S.C. 1503	5, 7, 8
8 U.S.C. 1503(a)	2, 3, 4, 6, 8, 9

Regulations—Continued: Page

22 C.F.R.:
Section 7.3(a) 6
Section 50.50 4
Section 50.52 6
Sections 50.60-50.72 (1967) 6

Miscellaneous:

139 Cong. Rec. S8554 (daily ed. July 1, 1993) 7
31 Fed. Reg. 13,537 (1966) 6
7 Foreign Affairs Manual (1984) 6

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-161

WERNER T. HEUER, PETITIONER

v.

UNITED STATES SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 20 F.3d 424. The order of the district court (Pet. App. 11-12) is unreported. The report and recommendation of the magistrate judge (Pet. App. 13-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1994. The petition for a writ of certiorari was filed on July 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in the United States to parents who were Venezuelan citizens, and he thereby became a citizen of both Venezuela and the United States. Pet. App. 2. On October 27, 1977, at the age of 21, petitioner presented himself at the United States Embassy in Caracas, Venezuela, and formally renounced his United States citizenship before the Consul General and two witnesses, in accordance with 8 U.S.C. 1481(a)(5) and its implementing regulations. Pet. App. 2, 14. As part of the renunciation process, petitioner executed an oath of renunciation, a "Statement of Understanding," and a separate "Statement of Decision" setting forth his reasons for the renunciation. *Id.* at 14. On October 31, 1977, the Embassy forwarded a draft Certificate of Loss of Nationality (CLN) with respect to petitioner to the Department of State, in accordance with 8 U.S.C. 1501. The Department approved and issued petitioner's CLN on April 27, 1978. Pet. App. 2.

Petitioner subsequently returned to the United States to attend college, and took up permanent residence in this country. Pet. 6; Pet. App. 3. In 1988, at the age of 32, petitioner applied for a United States passport. The Miami Passport Agency denied the application on the basis of petitioner's previous renunciation of his United States citizenship. The State Department's Board of Appellate Review affirmed the denial of petitioner's application in January, 1991. Pet. App. 3.

2. In September, 1992, petitioner filed this action under 8 U.S.C. 1503(a). Pet. App. 3. Section 1503(a) provides that any person within the United States who "claims a right or privilege as a national of the United States and is denied such right or privilege by any department * * * upon the ground that he is not a

national of the United States" may seek a judicial declaration of U.S. nationality. Petitioner alleged that his prior renunciation of citizenship resulted from family coercion and duress and was therefore not "voluntarily perform[ed]" within the meaning of 8 U.S.C. 1481. Pet. App. 3; see Pet. 6.

The district court accepted the magistrate's recommendation that petitioner's complaint be dismissed for failure to comply with the statute of limitations set out in Section 1503(a), which provides that "[a]n action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege." Pet. App. 11-12, 17. The magistrate concluded that the limitations period began to run on April 27, 1978, when the Department of State approved and issued petitioner's CLN, rather than when he later applied for and was refused a U.S. passport. *Id.* at 15-17. Because petitioner filed his action more than 14 years after the issuance of his CLN, the court held that the declaratory action was time-barred. *Id.* at 16-17.

The court of appeals affirmed. Pet. App. 1-10. It reasoned that issuance of a CLN is an "administrative denial" of a "right or privilege as a national of the United States," 8 U.S.C. 1503(a), because the CLN "denies the status to be recognized as a United States national, and all the rights and claims thereto." Pet. App. 7. The court noted (*ibid.*) that the Department of State may issue a CLN on its own initiative if it concludes that a U.S. national has engaged in any of the activities specified in 8 U.S.C. 1481(a), voluntarily and with the intent to relinquish U.S. nationality. See 8 U.S.C. 1501. The explicit renunciation procedure followed by petitioner is only one of those activities, see 8 U.S.C. 1481(a)(5), and the court concluded that the fact that in such cases an individual "requests" denial of his U.S.

nationality does not change the character of the formal denial embodied in the CLN. Pet. App. 7.

The court of appeals also rejected the reasoning of *Whitehead* v. *Haig*, 794 F.2d 115 (3d Cir. 1986), which held that the issuance of a CLN is not a "final administrative denial" within the meaning of 8 U.S.C. 1503(a). The Third Circuit believed that the State Department's issuance of a CLN upon receipt of a report from a consular officer was "automatic" and "ministerial," and was not the product of any administrative proceedings. 794 F.2d at 118. The court below concluded that, "[c]ontrary to the reasoning of *Whitehead*, the issuance of a CLN is * * * the product of administrative proceedings," not "a mere ministerial 'rubber stamp,'" because "one who is issued a CLN may appeal its issuance to the Department of State's Board of Appellate Review. 22 C.F.R. § 50.52." Pet. App. 7-8.[1]

---

[1] The court also reasoned (Pet. App. 8) that issuance of a CLN involves a true administrative process because until the Department of State has made a determination of loss of nationality and issued a CLN, "any act of expatriation, whether or not intentional, is simply an act without significance to nationality or status." It is true that the statutory and regulatory process for voluntary renunciation of U.S. nationality is not complete until the Secretary has approved and issued a CLN, see 8 U.S.C. 1481(a)(5), 1501; 22 C.F.R. 50.50, and that, as a practical matter, the Department will generally continue to recognize an individual as a U.S. national until it has learned of a possible expatriating act, made inquiries, determined that such an act has occurred, and completed the administrative process that leads to issuance of a CLN. The Act does not, however, condition the loss of nationality on knowledge or recognition by the Department of the expatriating act. If an individual commits an expatriating act, his U.S. nationality terminates at the time of the act—subject to later, and potentially difficult, proof that the act was voluntary and performed with the intent to relinquish nationality. See generally 8 U.S.C.

Finally, the court reasoned (Pet. App. 8) that if issuance of a CLN were never deemed to be an administrative denial of a claimed right or privilege of nationality, then CLN recipients who (unlike petitioner) disagreed with the Department's determination that they had performed expatriating acts would not be able to seek a judicial declaration of nationality directly under 8 U.S.C. 1503. They would instead be required to apply for a U.S. passport, wait for the application to be denied, and only then file suit to challenge the denial of the application. Pet. App. 8-9. The court "[did] not believe that such a required sequence of events was within the contemplation of [the] statute." *Id.* at 9.

ARGUMENT

Petitioner contends (Pet. 8-11) that certiorari should be granted because the decision below conflicts with the Third Circuit's decision in *Whitehead* v. *Haig*, 794 F.2d 115 (1986), and presents an important question of federal law warranting review by this Court.

As explained above (see page 4, *supra*), the premise of the Third Circuit's decision in *Whitehead* was that the State Department's issuance of a CLN was automatic and ministerial and was not the product of any administrative proceedings. That premise is incorrect. The State Department will not issue a CLN unless a report has been presented to it that establishes a factual basis for loss of nationality under the applicable statutory provision. In this case, for example, petitioner formally renounced his citizenship, under oath, before the Consul General and two witnesses, in accordance with 8 U.S.C. 1481(a)(5) and its implementing regula-

---

1481(b) (burden of proof on loss of nationality); *Vance* v. *Terrazas*, 444 U.S. 252 (1980).

tions, and at the same time executed a "Statement of Understanding" and a "Statement of Decision" that set forth his reasons for doing so. Those materials were then forwarded to the Department of State, and they constituted the "record" on which the Department acted in issuing the CLN. Moreover, after the time that the plaintiff in *Whitehead* renounced his citizenship, the Department adopted regulations establishing a procedure for appealing the issuance of a CLN. See 22 C.F.R. 7.3(a).[2] Persons who receive an approved CLN must be notified of their right to appeal. 22 C.F.R. 50.52; 7 Foreign Affairs Manual § 1232 (1984). Thus, whatever might have been the case when the CLN at issue in *Whitehead* was issued, the court of appeals in this case correctly concluded that the appellate procedure provided by the regulations, considered together with the various statutory bases on which the Department of State may find expatriation, "convey that more than a mere ministerial 'rubber stamp' is involved." Pet. App. 7.

In any event, whatever doubt might once have existed about whether issuance of a CLN should be regarded as a "final administrative denial" of a right or privilege of nationality within the meaning of 8 U.S.C. 1503(a) has been eliminated by the recent enactment of Section 106 of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, which was approved by the President on October 25, 1994. That provision amends Section 358 of the Immigration and Nationality Act (INA), 8 U.S.C. 1501, by adding the following new sentence at the end thereof:

---

[2] Whitehead renounced his citizenship and was issued a CLN in 1965. 794 F.2d at 116. The regulations establishing an appeals procedure were promulgated in 1966. See 31 Fed. Reg. 13,537 (1966); 22 C.F.R. 50.60-50.72 (1967).

> Approval by the Secretary of State of a certificate [that a person has lost his United States nationality] shall constitute a final administrative determination of loss of United States nationality under this Act, subject to such procedures for administrative appeal as the Secretary may prescribe by regulation, and also shall constitute a denial of a right or privilege of United States nationality for purposes of section 360 [of the INA, 8 U.S.C. 1503].

This explicit statutory directive removes any remaining basis for the Third Circuit's view in *Whitehead* that approval of a CLN does *not* constitute a final administrative denial of a right or privilege as a national of the United States, and makes clear that the five-year statute of limitations in 8 U.S.C. 1503 begins to run upon issuance of a CLN.

The legislative history of the 1994 Act confirms that understanding. The section-by-section analysis included in the record by Senator Kennedy at the time the bill was introduced and first passed the Senate states that "[t]his section responds to the court decision in *Whitehead* v. *Haig*, 794 F.2d 115 (3d Cir. 1986), which held that the statute of limitations for seeking adjudication of citizenship ran only from the denial of a passport application, and not from approval of a Certificate of Loss of Nationality." 139 Cong. Rec. S8554 (daily ed. July 1, 1993).[3]

---

[3] The text and legislative history of the 1994 amendment also answer petitioner's alternative reliance (Pet. 11-13) on the quite different rationale of *Maldonado-Sanchez* v. *Shultz*, 706 F. Supp. 54 (D.D.C. 1989), which concluded that the issuance of a CLN to a person who renounces his citizenship is not the "denial" of a right of nationality, but rather the grant of such a right—namely, the right to renounce one's citizenship. *Id.* at 56.

In light of Section 106 of the 1994 Act, review by this Court is plainly unwarranted. That provision resolves the statute-of-limitations issue on a prospective basis. Moreover, the question of when the statute of limitations should be deemed to have commenced with respect to CLNs that have been issued in the past is not one of substantial importance. As petitioner concedes (Pet. 11), since the decision in *Whitehead* eight years ago, there has been only one other published opinion addressing the issue, the district court decision in *Maldonado-Sanchez* v. *Shultz*, 706 F. Supp. 54 (D.D.C 1989) (discussed in note 3, *supra*).[4] There is accordingly no reason to believe that the issue will arise to any significant extent with respect to CLNs issued in the past, and it may properly

---

[4] Several other cases decided prior to *Whitehead* raised the same or similar issues. The court below drew support (Pet. App. 5-6) from the statement in *Garcia-Sarquiz* v. *Saxbe*, 407 F. Supp. 789, 792 (S.D. Fla. 1974), aff'd on opinion below, 527 F.2d 1389 (5th Cir. 1976), that the statute of limitations on an action under Section 1503(a) would begin to run at the time of a citizen's renunciation of nationality. This Court's decision in *Vance* v. *Terrazas*, 444 U.S. 252 (1980), and the decisions in *Richards* v. *Secretary of State*, 752 F.2d 1413 (9th Cir. 1985), and *Kahane* v. *Shultz*, 653 F. Supp. 1486 (E.D.N.Y. 1987), all based jurisdiction under Section 1503(a) on issuance of a CLN, although none of those cases involved a formal renunciation of nationality under 8 U.S.C. 1481(a)(5), and *Terrazas* and *Richards* both involved denials after an administrative appeal from the issuance of a CLN. Finally, in *Ferretti* v. *Dulles*, 246 F.2d 544, 546 (1957), the Second Circuit accepted the argument (advanced in that case by the government) that a citizen who resided abroad and who received a notice of expatriation from consular officials after she voted in a foreign election could not maintain an action under Section 1503(a) because she had not yet suffered "the denial of any specific right or privilege [of U.S. nationality] which she had claimed." See also *Linzalone* v. *Dulles*, 120 F. Supp. 107 (S.D.N.Y. 1954) (rejecting similar arguments on behalf of the government).

be left to the lower courts to decide, in the first instance, what effect the 1994 amendment to 8 U.S.C. 1501 should have on the resolution of the statute-of-limitations issue in any future cases that do present that issue.[5]

Nor, finally, is there any need to grant certiorari to ensure a just result in this case. Cf. *Ticor Title Ins. Co.* v. *Brown*, 114 S. Ct. 1359, 1362 (1994). Even if petitioner were entitled to adjudication of his claim on the merits, it is highly unlikely that he could show that his original renunciation of nationality was involuntary. Petitioner, who was 21 years old at the time, now claims (Pet. 6) that his family pressured him into the renunciation. But as in *Maldonado-Sanchez* v. *Shultz*, 706 F. Supp. at 58-61, a case with remarkably similar facts, petitioner has in the end alleged nothing more than that he was confronted, as a young adult, with a difficult choice between maintaining his U.S. citizenship and maintaining good personal and financial relations with his family. That sort of "pressure," however unpleasant, falls far short of the type of duress or coercion that would be required to make petitioner's action "involuntary" in the eyes of the law. See also *Richards* v. *Secretary of State*, 752 F.2d at 1419-1422; compare, *e.g.*, *Brady* v. *United States*, 397 U.S. 742, 749-752 (1970) (guilty plea "voluntary" although to some extent induced by desire to avoid application of

---

[5] The Department of State has informed us that from 1985 through the end of August, 1994, the Department issued a total of 4,165 CLNs, or approximately 427 per year. Of course, not all of those CLNs involve renunciations under 8 U.S.C. 1481(a)(5), and in most instances, CLNs that do involve a formal renunciation of U.S. nationality will never be challenged. Petitioner concedes (Pet. 13) that CLNs issued on some basis other than formal renunciation do constitute final administrative denials for purposes of triggering the statute of limitations in 8 U.S.C. 1503(a).

death penalty statute that was later ruled unconstitutional).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PHILEMINA MCNEILL JONES
DONALD E. KEENER
Attorneys

OCTOBER 1994